No. 15620

United States
COURT OF APPEALS
for the Ninth Circuit

WARDE H. ERWIN and MARY LOU ERWIN,
Appellants,

vs.

RALPH C. GRANQUIST, District Director of Internal Revenue,
Appellee.

APPELLANTS' REPLY BRIEF

Appeal from the United States District Court for the District of Oregon.

WARDE H. ERWIN,
in propria personam and attorney for appellant Mary Lou Erwin.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 11-57

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TAXPAYERS' GENERAL ARGUMENT

In order to point up the positions of the parties, appellants would like to quote an imaginative statute dealing with real estate instead of income:

Section x x x:

> Any person who expects within a twelve-month period to acquire real property of a value in excess of $600.00 shall estimate the amount to be paid for said property and compute the estimated real estate

> taxes to be assessed thereon and shall pay one-fourth thereof to the county treasurer each quarter, such estimate shall be made under penalty of perjury. In addition, failure to estimate within 70% of the tax as finally determined or failure to file an estimate will result in penalties being assessed based on the amount of tax as finally determined.

Would such an act be constitutional?

Would it be constitutional even if some other statute required present owners of real estate to estimate the tax and pay one-fourth in advance of assessment?

The analogy with the estimate provisions is obvious. It is a fundamental principle of taxation that no tax can be levied upon property until the property comes into existence.

This is the fundamental basis upon which appellants' arguments are premised.

THE GOVERNMENT'S GENERAL ARGUMENT

The government's argument seems to be bottomed on the premise that the Act which is questioned (Section 58) was enacted as a corollary to the withholding provisions (Br. 5).

Instead of "corollary" the Government would have more properly said that Section 58 was passed in an attempt to provide constitutional substance to the withholding provisions which would otherwise have been obviously unequal. However, whatever words are used, that was the purpose, as we lawyers are aware, and as the Government's brief finally admits.

The Government's argument is that the withholding statutes are constitutional and therefore Section 58 must also be constitutional because (in effect) it was passed to prevent a charge of unconstitutionality being made against the withholding provision for arbitrariness and lack of uniformity and of equality? (Br. 5 and 6.)

It should be clearly pointed out that the Government's statement that the withholding provisions have been held to be constitutional (Br. 4 and 5) is erroneous and is not support by the citations.

Kellems v. U. S., 97 F. Supp. 681, was decided on the sole question that the taxpayer did not have a bona-fide belief in the lack of constitutionality and hence was not in a position to raise the question. No constitutional question was determined.

Brushaber v. Union Pacific R. R., 240 U.S. 1, did not determine the constitutionality of "withholding on income not earned or not in existence" but merely held that the statutory requirements for withholding a fixed portion of interest paid on corporate indebtedness did not violate the due process clause on the ground that it cast an undue burden on the corporation. Nothing in the Act of 1913 required any "estimate of tax based on future earnings or provided penalties.

The Brushaber case was cited in *Fernandez v. Wiener,* 236 U.S. 340, and is authority of plaintiffs' position. It said:

> "nor does a tax upon the receipt of income *which was earned* and due before the enactment of the taxing statute" (Offend due process). (Emphasis added)

No case that we have found has determined directly the constitutionality of the "withholding statutes" as they apply to the taxpayer.

While we express our serious doubts of the constitutionality of the "withholding provisions," whether they be constitutional or not can not determine the constitutionality of the "declaration of estimate provisions" and will not be argued.

We feel confident in advising the Court that the constitutionality of neither the "withholding provisions" or the "declaration of estimate provisions" has to this date been directly determined by any court.

The issue here is directed solely to the constitutionality of "declaration of estimate provisions," and these provisions are a separate and distinct enactment not depending on the "withholding provisions" in any manner.

The fallacy of the general argument of the Government is pointed out by its own brief.

For instance, on page 6, it is said:

> "It is recognized that an effective administration of a pay-as-you-go tax on income which was not withheld depended upon full disclosure by a taxpayer of his estimated income for the current year."

The Court should consider carefully the language of that argument:

The statement is self contradictory. "Pay-as-you-go tax on income" supposes the existence of income measured by lapse time, while "estimated income for the current year" indicates that income is not in existence and is "guessed" or "estimated."

In addition, the following is also self-contradictory:

"depends upon *full disclosure* by a taxpayer of his *estimated* income for the *current year.*"

How can a person make a "full disclosure" of an "estimate of current year's income?" "Income" can not be determined until it is received." "Income" is not "income" until the passage of a fixed interval of time (App. Br. 9).

That there is no benefit to be derived from the statute itself is conceded. It provides no revenue and is not a collection procedure since there is no tax liability or assessment on the tax roles. A taxpayer computes and pays his tax for the preceding year on or before April 15 (formerly March 15) of the following year, and is obligated for the payment of the full amount of tax at that time (App. Br. 15).

The Government collects not one cent more by the so-called "declaration of estimate" in fact it becomes liable for and administratively refunds thousands of dollars of over-payments annually, an expensive and inaccurate procedure.

Since it provides no additional revenue, the sole and only benefit and justification for this statute then is that it was intended as a "constitutional crutch" to the withholding tax provisions to prevent that provision from being attacked for lack of uniformity and equality.

This was the information given to the Bar and the accountants immediately after passage of the Act. No attempt was made to enforce the provisions and generally no estimates were filed. Many years later, an at-

tempt was made to enforce the provisions only in those cases audited for other purposes and to "encourage" settlements, and no case prior to this case has been permitted to reach the court.

GOVERNMENT'S COMMENTS AS TO FOURTH AND FIFTH AMENDMENTS

The arguments of the Government regarding the "due process" and unreasonable search amendments are summarized on page 7 of its brief in the last paragraph wherein it is said:

> "Certainly, an argument can not reasonably be made that a statute violates the privilege against self-incrimination merely because it requires that a taxpayer accurately and honestly state facts to his Government under penalties of perjury."

We agree that no constitutional objection for lack of due process could be made to a declaration of "fact" requirement.

The plaintiffs' objections are to the exact same effect. Anyone can be constitutionally required to make a declaration as to what the *facts* are but never *before* the *facts* come into existence.

It would be just as improper to permit the Commissioner of Internal Revenue to guess during the year what my income for that year would be and to require a payment of tax based on that guess, as to require the taxpayer to do the same thing. It makes no difference who is to do the guessing.

The Government's statements (Br. 7) that there is no violation in requiring under penalty of perjury an "accurate" and "honest" statement as to something which is not yet in existence begs the question presented here, and the statement, itself, aptly illustrates the correctness of plaintiffs' position.

How can a person make an "accurate" guess as to facts not yet in existence and by what standards is the "honesty" of that guess to be measured?

When taxpayers refused to make a "guess" under penalty of perjury, what their future income would be, they were within their constitutional rights protecting them against self-incrimination.

Plaintiffs feel that to require a disclosure under penalties of perjury of a fact not yet in existence would be a "search" and would be a violation of the "security" section of the Fifth Amendment under the principles of *Boyd v. U. S.,* 116 U.S. 616, and reaffirm the argument set forth in the opening brief.

THE TAX POWER OF CONGRESS

On page 8 of the Government's brief, is discussed a contention that the due process clause is not violated because (in effect) the statute is a "tax statute," and tax statutes can not be unconstitutional unless they exert a forbidden power or confiscation of property.

Here we have difficulty in following the Government's contention.

This argument requires a determination of whether or not this statute is a "tax measure," and the Government contends both that it is (p. 8) and that it is not (p. 9).

The present statute is not a "levy." It is a payment in advance based upon what the taxpayers' guessed future income and guessed tax based on the guessed income might turn out to be with a penalty for perjury for failure to guess correctly.

It is not a "collection" of tax because no assessment is on the tax roles when the payment is required.

As quoted from defendant's brief (Br. 8-9) this case presents:

> "The rare and special instance which compels the conclusion that the statute does not involve the exertion of the tax power."

Government's brief itself reflects the contradiction when talking about the estimate provisions as a "tax measure" (Br. 8), and at the same time trying to construe the measure as a "tax which isn't a tax?"

On page 9 of its brief, it states:

> "Section 58 does not impose either kind of tax (property or capitation). It merely requires the filing of a return stating what the estimated tax will be. Neither of these sections levies a tax which can be called a direct tax. The statutory scheme makes it plain that what was intended, and what was accomplished, was to place taxpayers on a current pay-as-you-go basis."

Pay-as-you-go on what?

By the Government's own brief, it is not a tax so it couldn't be a pay-as-you-go tax because nothing has come into existence to tax.

The statute is clearly a pay-as-you-go "guess" subject to penalties for guessing wrong.

A further illustration is the Government's statement. (Br. bot. 9) states that:

> "Certainly, the requirement of paying tax concurrently with earned income can not convert a constitutional tax into an unconstitutional direct tax."

Here, the Government contends this is a tax on "income." The Court will remember that the income tax is a "direct tax" and required the constitutional amendment to permit the levy without apportionment. *Brushaber v. U. S.*, 240 U.S. at 19 (also see p. 16 et seq.), explaining *Pollack v. Farmers Loan & Trust Co.*, supra. Defendant's statement (Br. 9) that section 58 does not impose a direct tax because it is not a tax on property is incorrect (if it is a tax on income as the government states). Such a statement is directly contrary to the direct holding of Pollack and Brushaber cases which hold that income is property and the tax is direct.

However, if as the Government concedes:

> "neither of these sections levies a tax which can be called a direct tax"

then it must be conceded that Section 58 is not a tax on income (because the income tax is a direct tax) but it can not be denied that if it is a tax of some kind, it is a direct tax on the individual or his property and it must therefore be apportioned (*Pollock v. Farmers Loan & Trust Co.*, 157 U.S. 429).

The Government can not ride both horses at the same time at least not for longer than the ten odd years it has taken to finally get a case into the court for determination.

Let's get down to facts. If it is an income tax as the Government contends, then let's find out where the "income" is that it attempts to tax. If it is any other kind of tax, then why isn't it apportioned? If it isn't any kind of a tax then where are the standards by which its definiteness and certainty required by due process are to be measured? If what the Government is trying to say is that Section 58 is not an income tax because the income on which it is to be based is not in existence, we agree and we are right back to the fundamental question. Can a person be constitutionally required to estimate future income under penalty of perjury?

CONCLUSION

The cases of *Porth v. Broderick,* 241 F.2d 925 (CA 10th) and *Walker v. U. S.,* 240 F.2d 60 (CA 5th), are cited for the proposition that Section 58 and the penalty sections 294 (d) (1) (A) have been held constitutional.

This is not correct—*Porth v. Broderick* was an attempt to declare the 16th Amendment to be unconstitutional. The court held contrary to the taxpayer's contention.

Walker v. U. S., 240 F.2d 601, was a case in which the plaintiff here filed a brief amicus curiae.

In refusing to consent to the filing by plaintiffs of a

brief amicus curiae in the Walker case, Mr. Charles K. Rice by Lee A. Jackson (both counsel in this case) advised the Fifth Circuit by letter under the date of September 28, 1956, as follows:

> " . . . we call to your attention the fact that the motion (to file a brief amicus curiae) indicates that the amicus brief will present upon appeal for the first time an issue which was not raised in the District Court, namely whether Section 58 of the 1939 Code is a valid provision."

The Government's contention in the Walker case was that the taxpayer questioned only the validity of the "penalty provisions" (Section 294 (d) (1) (A) and not the "declaration of estimate" provisions (Section 58) and that the court should not therefore consider the constitutionality of Section 58.

The Court followed the Government's theory and held:

> "The question presented by the appeal is whether the statute (294 (d) (1) (A)) providing for additions to tax where a taxpayer fails through willful neglect to make or file a declaration of estimated tax is constitutional."

Fifth Circuit therefore avoided the constitutional question as to Section 58 and said:

> "Appellants do not attack directly the statutory requirement that estimates be filed; and it is difficult to perceive any sound reason why Congress should not have possessed the power to lay this duty upon taxpayers as a reasonable constituent of ascertaining the amount of taxes to be assessed."

The gratuitous dicta is of course erroneous insofar as it assumed Section 58 is a "constituent of ascertaining

the amount of taxes to be assessed." The Government itself concedes, as it must, that the purpose of Section 58 was not a step in any determination of ultimate tax. In fact, they contend it was an attempt to collect a tax before such a tax was due.

We think it unfortunate that the Justices of the Fifth Circuit were not better informed of the purposes and effect of the legislation, because although the statement is dicta such statements sometimes (as in the present case) are cited for a proposition which is obviously incorrect.

Mr. Walker (a Texas lawyer) in his petition for rehearing quoted the above language (in full) and asked the Court to make a finding directly on the constitutionality of Section 58. The petition for rehearing was denied.

The case of *Beacham v. Commission,* 28 T.C. 67 (on appeal to the 5th Circuit) was decided on exactly the same basis as Walker. Taxpayers only questioned the penalty provisions 294 (d) (1) (A) and 294 (d) (2) as violative of the due process clause.

This Court then is the only Court in which the question has successfully been directly presented and presents to this Court a matter of first impression.

The other cases cited as construing similar statutory provisions have not upheld any constitutionally similar matter—contrary to the conclusion of defendant's brief.

Abney v. Campbell, 206 F.2d 836, did not involve a taxpayer and raised only the question of "involuntary servitude" in collecting taxes for the Government.

Cain v. U. S., 211 F.2d 375, involved a self-employment tax which is a Social Security measure and is not a "tax" at all.

Kellems v. U. S. (supra) has already been discussed and the constitutionality was not determined at all and was decided on the ground that the question was improperly raised.

The remaining decisions cited did not discuss the constitutional question involved here and are not helpful to the Court.

This matter is presented to the Court in the sincere belief that any person, judge, lawyer or layman, having taken the oath to *support and defend* the constitution of the United States can not ignore the obvious challenge presented in this case.

No lawyer as an officer of this Court having taken such oath and after successfully and repeatedly defending clients against imposition of such an obviously unconstitutional provision could properly yield when the challenge is flung in his direcion.

It is the Bench and Bar on trial in this case.

We submit the matter to the Court's "honest" and "fearless" and independent determination of an important issue:

Is Section 58 constitutional?

Respectfully submitted,

WARDE H. ERWIN, in propria personam
and attorney for Mary Lou Erwin.